

Appendix 11 L/BA Selected Legal Authorities and Issues

ADMINISTERING PUBLIC DIPLOMACY GRANTS AND COOPERATIVE AGREEMENTS

**TOPIC—GRANTS & COOPERATIVE AGREEMENTS;
INTERAGENCY AGREEMENTS;
GIFT-RECEIVING AUTHORITY; *et al.***

**AN OUTLINE OF
SELECTED LEGAL AUTHORITIES AND ISSUES**

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NOTE — This Outline is in summary form and is intended solely for general background and discussion purposes. As such, these materials, as well as any comments made during the presentation, are not intended to provide specific legal or other advice; nor do such materials or comments necessarily represent the policy or position of L/BA or of the Office of the Legal Adviser.

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AN OUTLINE OF SELECTED LEGAL AUTHORITIES AND ISSUES

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AN OUTLINE OF SELECTED LEGAL AUTHORITIES AND ISSUES

By L/BA - Pete Ritenburg

I. ACQUISITION AND ASSISTANCE — GENERAL PRINCIPLES

Acquisition.

“Every agency has inherent authority to enter into contracts **to procure goods and services for its own use**, as long as the purpose of the procurement is reasonably related to the agency’s mission.”
[GAO Principles of Federal Appropriations Law, 2d ed. at 10-11.]

Assistance.

“However, there is no comparable **inherent** authority to give away the government’s money or property ... to benefit someone other than the government; this must be authorized by Congress. Therefore, the agency’s basic legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.” [*Id.*]

II. FEDERAL GRANT & COOPERATIVE AGREEMENT ACT

The Act **defines** but does not, by itself, **authorize** acquisition and assistance.

See Attachment A <Page 7>: Full text of FG&CAA.

v **Key question** — “Is the principal purpose to serve the immediate needs of the federal government, or is it to provide assistance to a non-federal entity in serving a public purpose?” [67 Comp. Gen. 13, 15 (1987)]

Acquisition.

1. Use a “procurement contract” when the **principal purpose** is:
 - To **acquire** (by purchase, lease, or barter) property or services,
 - For the **direct benefit or use** of the United States Government.

Assistance.

2. Use a “grant agreement” when the principal purpose is:
 - To **transfer** a thing of value,
 - To carry out a public purpose of **support or stimulation**,
 - **Authorized by a law** of the United States; *and*
 - ▶• Substantial involvement is **not** expected.
3. Use a “cooperative agreement” when the principal purpose is:
 - To **transfer** a thing of value,
 - To carry out a public purpose of **support or stimulation**,
 - **Authorized by a law** of the United States; *and*
 - ▶• Substantial involvement **is** expected.

See Attachment B <Page 9>: The Difference Between Grants and Cooperative Agreements—“Substantial Involvement”.

Some other common issue areas in providing assistance:

v Grants and cooperative agreements are not “*procurement contracts*,” *but* they **are contracts**, requiring certain actions by the recipient -- without such requirements, they would be **gifts**. [10 Nash & Cibinic Report ¶ 2 (Jan. 1996)]

vv Third-party/Intermediary Situation -- The agency/third-party relationship should be a “procurement contract” if the intermediary is not a member of a class eligible to receive assistance. If an agency program requires the agency to provide advice or services to a grantee, the agency may do so itself *or* use an intermediary to do it *for* the agency. Because the agency is “buying” services from an intermediary for its own purposes (to relieve the agency of the need to provide services with its own staff), the proper legal instrument is a procurement contract.

See Attachment G <Page 20>: Third-Parties & “Institutional Grantees”.

III. PUBLIC DIPLOMACY ASSISTANCE AUTHORITY

Mandatory assistance.

Congress specifically funds certain statutory (“mandatory”) grantees, such as the National Endowment for Democracy, East-West Center, and North-South Center.

See Attachment E <Page 16>: Public Diplomacy Mandatory Grantees.

Discretionary assistance.

DOS also has discretionary assistance authority under the Fulbright-Hays Act and the Smith-Mundt Act.

See Attachment D <Page 12>: Compendium of Assistance Authorities.

IV. COMPETITION

A goal of FG&CA is to “*maximize* competition in making procurement contracts, and *encourage* competition in making grants and cooperative agreements.”

Acquisition.

The goal to “maximize” competition is probably not a mandatory legal directive, *but* there are such directives and standards that are directly based on other statutes and which are implemented in the Federal Acquisition Regulation (FAR):

FAR PART 6 COMPETITION REQUIREMENTS

6.003 Definitions.

“Full and open competition,” when used with respect to a contract action, means that *all* responsible sources are permitted to compete.

6.101 Policy.

(a) 10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions (see Subparts 6.2 and 6.3), that contracting officers *shall* promote and provide for **full and open competition** in soliciting offers and awarding Government contracts.

FAR PART 13 SIMPLIFIED ACQUISITION PROCEDURES

13.104 Promoting competition.

The contracting officer shall promote competition to the *maximum extent practicable* to obtain supplies and services from the source whose offer is the most advantageous to the Government, considering the administrative cost of the purchase. * * *

(b) Maximum practicable competition ordinarily can be obtained by soliciting quotations or offers from sources within the local trade area. Unless the contract action requires synopsis ... and an exception is not applicable, consider solicitation of *at least three sources* to promote competition to the maximum extent practicable.

Assistance.

Beyond FG&CAA *encouraging* competition in assistance programs, there are no *generally* applicable statutory requirements for competition; *But* ...

See Attachment F <Page 18> — Competition in overseas public diplomacy grants!?!

V. AWARD RECIPIENTS

General rule.

While *there is no general prohibition in the law against grants to profit-making institutions*, “whether a particular grant may or would be made to such an organization would depend on, among other factors, the purpose and terms of the statute authorizing the grant and the policies of the agency administering it.” Of course, “if the statutory authority for a grant program restricts the grants to nonprofit organizations, such grants generally could not be made to a profit oriented organization even though the work under this grant is not a part of the organization’s profit-making activities.”

Matter of: Department of Health & Human Services payment of profits to small businesses awarded grants under the Small Business Innovation Development Act, 71 Comp. Gen. ¶ 310, n.4, B-245032 (March 9, 1992).

See Attachment C <Page 11>: Grants to Commercial Organizations?

An exception to the rule.

22 U.S.C. 1471 (Sec. 801 of the Smith-Mundt Act)

In carrying out the purposes of this chapter, the Secretary is authorized--
In carrying out subchapter II of this chapter [22 U.S.C. 1447], *to make grants* of money, services, or materials to State and local governmental institutions in the United States, to governmental institutions in other countries, and to individuals and *public or private nonprofit organizations* both in the United States and in other countries;

{ Subchapter II consists of 22 U.S.C. 1447 (Sec. 202 of Smith-Mundt). }
The Secretary is authorized to provide for interchanges between the United States and other countries of books and periodicals, including government publications, for the translation of such writings, and for the preparation, distribution, and interchange of other educational materials.

And sometimes even a non-profit can profit.

22 U.S.C. 4416. Retention of interest (NED Act § 507).

[G]rant funds made available by the National Endowment for Democracy may be deposited in interest-bearing accounts ... and any interest which accrues may be retained by the grantee without returning such interest to the Treasury of the United States

VI. REGULATIONS

Assistance instruments are subject to minimal regulatory guidelines and procedures (primarily, OMB Circulars) when compared with vast body of “law” which controls acquisitions, including OMB Circulars, OFPP policy letters, “case law” (*e.g.*, GAO bid protest decisions; Federal Court and Board of Contract Appeals decisions), and, most notably, the Federal Acquisition Regulation (FAR):

Acquisition (Federal Acquisition Regulation).

FAR 2.101 Definitions.

“*Acquisition*” means the acquiring by contract with appropriated funds of supplies or services (including construction) ***by and for the use of the Federal Government*** through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. * * *

“*Contract*” means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. ... ***Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq.***

Assistance (OMB Circulars).

- A-21 Cost Principles for Educational Institutions.
- A-87 Cost Principles for State and Local Governments.
- A-122 Cost Principles for Non-Profit Organizations.
- A-102 Grants and Cooperative Agreements with State and Local Governments.
- A-110 Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.
- A-133 Audits of States, Local Governments & Non-Profit Organizations.

However #1 -- The coverage of 22 C.F.R. Part 145 (Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations) “does ***not*** include (i) ***Foreign organizations*** (governmental or non-governmental); (ii) International organizations (such as agencies of the United Nations); or (iii) Organizations whose assistance agreement is for work ***to be performed outside the United States.***” 22 C.F.R. 145.2(ee)(2).

However #2 -- See Attachment F <Page 18>: 22 U.S.C. 1475h(c)(1) at Page 19.

VII. GIFT-RECEIVING AUTHORITY

General Rule -- Donations to agencies belong to the Government.

1. The USG (as opposed to a USG agency) *may* receive/accept gifts.
 - No particular statutory authority is necessary;
 - The gifts may be of real property or personal property; and
 - Since monetary gifts to the United States go to the general fund of the Treasury, there is no augmentation problem.
 2. A government *agency* may *not* accept for its own use (*i.e.*, for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of specific statutory authority.
 - Acceptance of a gift by an agency lacking statutory authority to do so is an improper augmentation.
 - Without statutory authority to accept donations, an agency must turn the money in to the Treasury as miscellaneous receipts.
- Excerpts from GAO, Principles of Federal Appropriations Law, 2d ed., p. 6-140.

But see Attachment M <Page 30>: State's Gift-Receiving Statutes.

1. General Authority -- Section 25 of the Basic Authorities Act.
2. Specific Public Diplomacy Authority -- Section 902 of the Smith-Mundt Act and Section 2455(f) of the Fulbright-Hays Act.

See 4 FAH-3 Financial Management Procedures Handbook at H-380 ("Gifts and Trust Funds") and the following.

1. "For purposes of determining the disposition of amounts collected, there is a distinction between donations, which are voluntary, and fees and assessments, which are not. Statutory authority to accept gifts and donations does not include fees and assessments exacted involuntarily."
GAO, Principles of Federal Appropriations Law, 2d ed., at 6-128.
2. As a general rule, when a federal entity expends both appropriated and donated funds to accomplish a statutory purpose, the expenditures from both sources are viewed as appropriated fund expenditures subject to all statutes and regulations governing such expenditures.
Matter of: The Honorable Constance A. Morella, House of Representatives, 68 Comp. Gen. 237, 238 (1989).

ATTACHMENT A

**THE FEDERAL GRANT AND
COOPERATIVE AGREEMENT
ACT OF 1977 (Public Law No. 95-224)**

UNITED STATES CODE (U.S.C.)
TITLE 31 — MONEY AND FINANCE
SUBTITLE V — GENERAL ASSISTANCE ADMINISTRATION
CHAPTER 63 — USING PROCUREMENT CONTRACTS AND GRANT AND
COOPERATIVE AGREEMENTS

Sec. 6301. Purposes

The purposes of this chapter are to —

- (1) promote a better understanding of United States Government expenditures and help eliminate unnecessary administrative requirements on recipients of Government awards by characterizing the relationship between executive agencies and contractors, States, local governments, and other recipients in acquiring property and services and in providing United States Government assistance;
- (2) prescribe criteria for executive agencies in selecting appropriate legal instruments to achieve —
 - (A) uniformity in their use by executive agencies;
 - (B) a clear definition of the relationships they reflect; and
 - (C) a better understanding of the responsibilities of the parties to them; and
- (3) promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements.

Sec. 6302. Definitions

In this chapter —

- (1) “executive agency” does not include a mixed-ownership Government corporation.
- (2) “grant agreement” and “cooperative agreement” do not include an agreement under which is provided only —
 - (A) direct United States Government cash assistance to an individual;
 - (B) a subsidy;
 - (C) a loan;
 - (D) a loan guarantee; or
 - (E) insurance.
- (3) “local government” means a unit of government in a State, a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, an interstate entity, or another instrumentality of a local government.

(4) “other recipient” means a person or recipient (except a State or local government) authorized to receive United States Government assistance or procurement contracts and includes a charitable or educational institution.

(5) “State” means a State of the United States, the District of Columbia, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

Sec. 6303. Using procurement contracts

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when —

- (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or
- (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

Sec. 6304. Using grant agreements

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when —

- (1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
- (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

Sec. 6305. Using cooperative agreements

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when —

- (1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
- (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

ATTACHMENT B

THE DIFFERENCE BETWEEN GRANTS & COOPERATIVE AGREEMENTS—“SUBSTANTIAL INVOLVEMENT”.

The following are Excerpts from the Department of Housing and Urban Development (HUD) Handbook on Discretionary Grant and Cooperative Agreement Policies and Procedures (Directive Number: 2210.17 REV 2 (1/92), Chapter 2 (Policy). <edited/downloaded from HUD's homepage-05/04/00>

CHAPTER 2. POLICY

2-4. PROGRAM PURPOSE AND INSTRUMENT SELECTION.

d. Pursuant to OMB guidance which implemented Public Law 95-224:

(1) A **grant agreement** is to be used as the legal instrument reflecting a relationship between HUD and a State or local government or other recipient whenever * * * ***substantial Federal involvement is not anticipated.***

(a) Substantial involvement is not anticipated when the terms of an assistance instrument indicate that the recipient can expect to run the project without agency collaboration, participation, or intervention as long as it is performed in accordance with the terms of the assistance instrument.

(b) ***Substantial involvement does not include:***

1. approval of recipient plans or applications prior to award;
2. normal Federal stewardship during the project such as site visits, performance reporting, financial reporting, and audits to ensure that standards, objectives, terms, and conditions of the project are accomplished;
3. general statutory requirements agreed to in advance of award such as civil rights, environmental protection, and provisions for the handicapped;
4. review of performance after completion;
5. general administrative requirements such as those set forth in OMB Circulars A-21, A-87, A-110, A-122, A-133, and 24 CFR Part 85; and,
6. unanticipated HUD involvement to correct deficiencies in project or financial performance from the terms of the assistance instrument.

(2) A **cooperative agreement** is to be used as the legal instrument reflecting a relationship between HUD and a State or local government or other recipient whenever * * * ***substantial Federal involvement is anticipated***. (Substantial involvement is anticipated when the instrument indicates that the recipient can expect agency collaboration or participation, or close agency oversight and control beyond routine Federal stewardship of funding in the management of the project.)

(a) Each cooperative agreement shall include an explicit statement of the nature, character, and extent of anticipated involvement.

(b) Examples *of activities generally associated with substantial involvement*:

1. authority to halt activity if specifications or work statements are not met;
2. review and approval of one stage of work before another can begin;
3. review and approval of substantive provisions of proposed subgrants or contracts beyond existing Federal policy;
4. HUD and recipient collaboration or joint participation;
5. monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects;
6. highly prescriptive HUD requirements which limit recipient discretion;
7. review and approval of key personnel; and,
8. substantial, direct HUD operational involvement or participation during the assisted activity.

ATTACHMENT C

GRANTS TO COMMERCIAL ORGANIZATIONS?

Excerpts from OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. (Rev. 11/19/93, Further Amended 9/30/99)

3. *Policy*. Except as provided herein, the standards set forth in this Circular are applicable to all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the statute shall govern. The provisions of the sections of this Circular shall be applied by Federal agencies to recipients. ...

Federal agencies may apply the provisions of this Circular to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations.

APPENDIX A - CONTRACT PROVISIONS

SUBPART A - General

___ .1 *Purpose*. This Circular establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. * * *

___ .2 *Definitions*. * * *

(cc) *Recipient* means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. ***The term may include commercial organizations***, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency.

SUBPART C - Post-Award Requirements

Financial and Program Management

___ .27 *Allowable costs*. For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. ... The allowability of costs incurred ***by commercial organizations*** and those non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

ATTACHMENT D

COMPENDIUM OF PUBLIC DIPLOMACY ASSISTANCE AUTHORITIES IN SMITH-MUNDT & FULBRIGHT-HAYS (Excerpts from the Former USIA's Organic Legislation, *as amended* by the Foreign Affairs Reform and Restructuring Act of 1998 -- Pub. L. No. 105-277.)

NOTE: The key “public diplomacy” authorities are at Smith-Mundt §501(a) [“dissemination abroad of information about the United States, its people, and its policies”] *and* at Fulbright-Hays §102(a) [“to provide by grant, contract, or otherwise” for educational exchanges, cultural exchanges, participation in international fairs and expositions abroad].

Preliminary Background — What is Public Diplomacy?

Public diplomacy promotes U.S. national security and other interests by seeking to understand, inform, and influence foreign publics and policy-makers, and by broadcasting the dialogue between American citizens and institutions and their counterparts abroad.

In comparison, *public affairs* is the provision of information to the press, the American people, and others about the policies and activities of the U.S. government.

Reorganization Report Submitted to Congress (p. 19)(March 1999).

New Department of State Authority under the U.S. Information and Educational Exchange Act [Smith-Mundt].

SUBCHAPTER II—INTERCHANGE OF PERSONS, KNOWLEDGE, AND SKILLS BETWEEN UNITED STATES AND FOREIGN COUNTRIES

22 U.S.C. 1447. Books and materials [Smith-Mundt Sec. 202]

The Secretary is authorized *to provide for interchanges* between the United States and other countries of books and periodicals, including government publications, for the translation of such writings, and for the preparation, distribution, and interchange of other educational materials.

22 U.S.C. 1448 [Smith-Mundt Sec. 203]

The Secretary is authorized *to provide for assistance* to schools, libraries, and community centers abroad, founded or sponsored by citizens of the United States, and serving as demonstration centers for methods and practices employed in the United States. In assisting any such schools, however, the Secretary shall exercise no control over their educational policies and shall in no case furnish assistance of any character

which is not in keeping with the free democratic principles and the established foreign policy of the United States. [Partial Repeal—Pub. L. 87-256, Sec. 111(a)(2), Sept. 21, 1961, 75 Stat. 538, repealed this section insofar as it relates to schools.]

SUBCHAPTER VIII—ADMINISTRATIVE PROCEDURE

22 U.S.C. 1471. Authority of Secretary of State [Smith-Mundt Sec. 801]

In carrying out the purposes of this chapter, the Secretary is authorized, in addition to and not in limitation of the authority otherwise vested in him [*sic*]—

(1) In carrying out subchapter II of this chapter, ***to make grants of money, services, or materials*** to State and local governmental institutions in the United States, to governmental institutions in other countries, and to individuals and public or private nonprofit organizations both in the United States and in other countries;

(2) ***to furnish, sell, or rent, by contract or otherwise***, educational and information materials and equipment for dissemination to, or use by, peoples of foreign countries; * * * *

22 U.S.C. 1472. Department of State and other Government agencies [Smith-Mundt Sec. 802]

(a) Authority of agencies

In carrying on activities which further the purposes of this chapter, subject to approval of such activities by the Secretary, the Department and the other Government agencies are authorized— * * * *

(2) to make contracts, including contracts with governmental agencies, foreign or domestic, including subdivisions thereof, and intergovernmental organizations of which the United States is a member, and, with respect to contracts entered into in foreign countries, without regard to section 22 of title 41; * * * *

(4) ***to make grants*** for, and to pay expenses incident to, training and study.

22 U.S.C. 1474. Additional authority of Secretary of State or other Government agency authorized to administer provisions [Smith-Mundt Sec. 804]

In carrying out the provisions of this chapter, the Secretary, or any Government agency authorized to administer such provisions, may— * * * *

(18) ***make advances of funds***; * * * *

New Department of State Authority under the Mutual Educational and Cultural Exchange Act [Fulbright-Hays].

22 U.S.C. 2452. Authorization of activities [Fulbright-Hays Sec. 102]

(a) Grants or contracts for educational or cultural exchanges; participation in international fairs and expositions abroad

The Secretary of State is authorized, when he [*sic*] considers that it would strengthen international cooperative relations, to provide, by ***grant, contract, or otherwise***, for—

(1) *educational exchanges*, (i) by financing studies, research, instruction, and other educational activities—(A) of or for American citizens and nationals in foreign countries, and (B) of or for citizens and nationals of foreign countries in American schools and institutions of learning located in or outside the United States; and (ii) by financing visits and interchanges between the United States and other countries of students, trainees, teachers, instructors, and professors;

(2) *cultural exchanges*, by financing—

(i) visits and interchanges between the United States and other countries of leaders, experts in fields of specialized knowledge or skill, and other influential or distinguished persons;

(ii) tours in countries abroad by creative and performing artists and athletes from the United States, individually and in groups, representing any field of the arts, sports, or any other form of cultural attainment;

(iii) United States representation in international artistic, dramatic, musical, sports, and other cultural festivals, competitions, meetings, and like exhibitions and assemblies;

(iv) participation by groups and individuals from other countries in nonprofit activities in the United States similar to those described in subparagraphs (ii) and (iii) of this paragraph, when the Secretary of State determines that such participation is in the national interest.

(3) *United States participation in international fairs and expositions abroad*, including trade and industrial fairs and other public or private demonstrations of United States economic accomplishments and cultural attainments.

22 U.S.C. 2454 Administration [Fulbright-Hays Sec. 104]

(e)(1) In providing for the activities and interchanges authorized by section 2452 of this title, ***grants may be made to or for individuals, either directly or through foundations or educational or other institutions, which foundations or institutions are public or private nonprofit, and may include funds for tuition and other necessary incidental expenses, for travel expenses from their places of residence and return for themselves***, and, whenever it would further the purposes of this chapter, for the dependent members of their immediate families, for health and accident insurance premiums, emergency medical expenses, costs of preparing and transporting to their former homes the remains of any of such persons who may die while away from their homes as participants or dependents of participants in any program under this chapter, and for per diem in lieu of subsistence at rates prescribed by the Director of the United States Information Agency, for all such persons, and for such other expenses as are necessary for the successful accomplishment of the purposes of this chapter.

22 U.S.C. 2460. Bureau of Educational and Cultural Affairs [Fulbright-Hays Sec. 112]

(a) Establishment; responsibilities

In order to carry out the purposes of this chapter, there is established in the Department of State, or in such appropriate agency of the United States as the President shall determine, a Bureau of Educational and Cultural Affairs (hereinafter in this section referred to as the “Bureau”). The Bureau shall be responsible for managing,

coordinating, and overseeing programs established pursuant to this chapter, including but not limited to—

(1) the J. William Fulbright Educational Exchange Program which, by promoting the exchange of scholars, researchers, students, trainees, teachers, instructors, and professors, between the United States and foreign countries, accomplishes the purposes of section 2452(a)(1) of this title;

(2) the Hubert H. Humphrey Fellowship Program which finances (A) study at American universities and institutions of higher learning, including study in degree granting programs, and (B) participation in fellowships, internships, or other programs in American governmental and nongovernmental institutions for public managers and other individuals from developing countries;

(3) the International Visitors Program which provides *grants* for short-term visits to the United States for foreign nationals who are, or have the potential to be, leaders in their respective fields in their own countries;

(4) the American Cultural Centers and Libraries which make available at selected foreign locations, books, films, sound recordings, and other materials about the United States, its people and culture, and about other topics;

(5) the American Overseas Schools Program which provides *financial assistance* to the operations of American-sponsored schools overseas;

(6) the American Studies Program which fosters and supports the study of the United States, and its people and culture, in foreign countries;

(7) a program of working with private, not-for-profit groups through *contracts, grants, or cooperative agreements*, as authorized by section 2452 of this title, so as to provide financial assistance to nongovernmental organizations engaged in implementing and enhancing exchange-of-persons programs;

(8) the Samantha Smith Memorial Exchange Program which advances understanding between the United States and the independent states of the former Soviet Union and between the United States and Eastern European countries through the exchange of persons under the age of 21 years and of students at an institution of higher education ... who have not received their initial baccalaureate degree or through other programs designed to promote contact between the young peoples of the United States, the independent states of the former Soviet Union, and Eastern European countries; and

(9) the Arts America program which promotes a greater appreciation and understanding of American art abroad by supporting exhibitions and tours by American artists in other countries.

(b) Revocation or diminution of grants

(1) All recipients of Fulbright Academic Exchange and Humphrey Fellowship awards shall have full academic and artistic freedom, including freedom to write, publish, and create. No award granted pursuant to this chapter may be revoked or diminished on account of the political views expressed by the recipient or on account of any scholarly or artistic activity that would be subject to the protections of academic and artistic freedom normally observed in universities in the United States. The Board shall ensure that the academic and artistic freedoms of all persons receiving grants are protected.

(2) The J. William Fulbright Foreign Scholarship Board shall formulate a policy on revocation of Fulbright grants which shall be made known to all grantees. Such policy shall fully protect the right to due process as well as the academic and artistic freedom of all grantees.

(c) Program requirements

The President shall insure that all programs under the authority of the Bureau shall maintain their nonpolitical character and shall be balanced and representative of the diversity of American political, social, and cultural life. The President shall insure that academic and cultural programs under the authority of the Bureau shall maintain their scholarly integrity and shall meet the highest standards of academic excellence or artistic achievement.

ATTACHMENT E

**PUBLIC DIPLOMACY
MANDATORY (STATUTORY) GRANTEES**

The “National Endowment for Democracy Act” (P.L. 98-164).

22 U.S.C. 4412. GRANTS TO THE ENDOWMENT

(a) AUTHORIZATION; FUNDING; GRANT AGREEMENT

The Secretary of State shall make an annual grant to the Endowment to enable the Endowment to carry out its purposes as specified in section 4411(b) of this title. Such grants shall be made with funds specifically appropriated for grants to the Endowment or with funds appropriated to the Department for the “Salaries and Expenses” account. Such grants shall be made pursuant to a grant agreement between the Secretary and the Endowment which requires that grant funds will only be used for activities which the Board of Directors of the Endowment determines are consistent with the purposes described in section 4411(b) of this title, that the Endowment will allocate funds in accordance with subsection (e) of this section, and that the Endowment will otherwise comply with the requirements of this subchapter. The grant agreement may not require the Endowment to comply with requirements other than those specified in this subchapter.

The “North/South Center Act of 1991” (P.L. 102-138, Sec. 208).

Sec. 2075. CENTER FOR CULTURAL AND TECHNICAL INTERCHANGE BETWEEN NORTH AND SOUTH

(b) PURPOSE--The purpose of this section is to promote better relations between the United States and the nations of Latin America and the Caribbean and Canada through cooperative study, training, and research, by supporting in Florida a Center for Cultural and Technical Interchange Between North and South where scholars and students in various fields from the nations of the hemisphere may study, give and receive training, exchange ideas and views, and conduct other activities consistent with the objectives of the Mutual Educational and Cultural Exchange Act of 1961 [22 U.S.C. 2451 et seq.] and other Acts promoting international, educational, cultural, scientific, and related activities of the United States.

(c) NORTH/SOUTH CENTER--In order to carry out the purpose of this section, the Secretary of State shall provide for the operation in Florida of an educational institution known as the North/South Center, through arrangements with public, educational, or other nonprofit institutions.

(d) AUTHORITIES--The Secretary of State, in carrying out this section, may utilize the authorities of the Mutual Educational and Cultural Exchange Act of 1961 [22 U.S.C. 2451 et seq.]. Section 2056(b) of this title shall apply in the administration of this section. In order to carry out the purposes of this section, the North/South Center is

authorized to use funds made available under this section to acquire property and facilities, by construction, lease, or purchase.

The “Center of Cultural And Technical Interchange Between East and West Act of 1960 (P.L. 86-472).

22 U.S.C. 2055. DUTIES OF SECRETARY OF STATE; ESTABLISHMENT AND OPERATION OF EDUCATIONAL INSTITUTION; GRANTS, FELLOWSHIPS, AND SCHOLARSHIPS; AVAILABILITY OF FACILITIES

In order to carry out the purpose of this subchapter the Secretary of State (hereinafter referred to as the “Secretary”) shall provide for --

(1) the establishment and operation in Hawaii of an educational institution to be known as the Center for Cultural and Technical Interchange Between East and West, through arrangements with public, educational, or other nonprofit institutions;

(2) grants, fellowships, and other payments to outstanding scholars and authorities from the nations of the East and West as may be necessary to attract such scholars and authorities to the Center;

(3) grants, scholarships, and other payments to qualified students from the nations of the East and West as may be necessary to enable such students to engage in study or training at the Center; and

(4) making the facilities of the Center available for study or training to other qualified persons.

ATTACHMENT F

STATUTORY CONTROLS AND CONSTRAINTS ON “OVERSEAS PUBLIC DIPLOMACY GRANTS”

Sec. 1335 of the Reform & Restructuring Act (Conforming Amendments) amended the following by substituting Department/Secretary for USIA/Director and introducing the phrase ***overseas public diplomacy***. (formerly, these sections referred to ***program grants***).

I. “Vetting overseas public diplomacy grants on the “Hill”.

22 U.S.C. 1477c.

The Department of State may award **grants for overseas public diplomacy programs** only if the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate are notified fifteen days in advance of the proposed grant.

Cable 99 STATE 223404 (Notification to Congress of Grants Overseas) advised all posts that the vetting requirement continues to apply only to public diplomacy grants that are awarded to institutions domestically.

II. Competition in overseas public diplomacy grants — Section 212 of USIA’s Authorization Act for FY 1992/1993 (Pub. L. No. 102-138) imposed a grant “competition” requirement which, as now codified, reads as follows.

22 U.S.C. 1475h. Overseas public diplomacy grants

(a) Competitive grant procedures

Except as provided in subsection (b) of this section, the Department of State shall work to achieve ***full and open competition*** in the award of grants for carrying out its overseas public diplomacy functions.

(b) Exceptions

The Department of State may award an overseas public diplomacy grant under procedures ***other than competitive procedures*** when—

(1) such a grant is made under the Mutual Educational and Cultural Exchange Act of 1961 (commonly known as the Fulbright-Hays Act) (22 U.S.C. 2451 *et seq.*) or any statute which expressly authorizes or requires that a grant be made with a specified entity;

(2) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization have the effect of requiring the use of procedures other than competitive procedures;

(3) a recipient organization has developed particular expertise in the planning and administration of longstanding exchange programs important to United States foreign policy; or

(4) introducing competition would increase costs.

(c) Compliance with grant guidelines

(1) After October 1, 1991, overseas public diplomacy grants awarded by the Department of State shall substantially comply with Department of State grant guidelines and applicable circulars of the Office of Management and Budget.

(2) If the Agency* determines that a grantee has not satisfied the requirement of paragraph (1), the Department of State shall notify the grantee of the suspension of payments under a grant unless compliance is achieved within 90 days of such notice.

(3) The Agency* shall suspend payments under any such grant which remains in noncompliance 90 days after notification under paragraph (2).

* So in original. Probably should be "Department".

ATTACHMENT G

THIRD PARTIES/INTERMEDIARIES AND THE “INSTITUTIONAL GRANT ORGANIZATIONS”

Third Party/Intermediary—The General Rule.

According to the General Accounting Office:

Another situation that has generated some controversy is the so-called “third party” or “intermediary” situation—where a federal agency provides assistance to specified recipients by using an intermediary. Again, it is necessary to examine the agency’s program authority to determine the authorized forms of assistance. *The agency’s relationship with the intermediary should normally be a procurement contract if the intermediary is not itself a member of a class eligible to receive assistance from the government.* In other words, if an agency program contemplates provision of technical advice or services to a specified group of recipients, the agency may provide the advice or services itself or hire an intermediary to do it for the agency. In that case, the proper vehicle to fund the intermediary is a procurement contract. The agency is “buying” the services of the intermediary for its own purposes, to relieve the agency of the need to provide the advice or services with its own staff. On the other hand, *if the program purpose contemplates support to certain types of intermediaries to provide consultation or other specified services to third parties, GAO has approved the agency’s choice of a grant rather than a contract* as the preferred funding vehicle.

“What is important is whether the federal government’s principal purpose is to acquire the intermediary’s services, which may happen to take the form of producing a product or carrying out a service that is then delivered to an assistance recipient, or if the government’s principal purpose is to assist the intermediary to do the same thing. Where the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract.”

GAO Red Book at 10-13 to 10-15 (quoting S. Rep. No. 180 at 3).

When an agency’s principal purpose is to acquire the services of an organization that ultimately will assist the authorized recipient of a grant or cooperative agreement, a contract should be used, *unless the agency’s program legislation specifically permits it to make grants to intermediaries.* GAO Opinion in Civic Action Institute, 61 Comp. Gen. 637 (1982).

Third Party/Intermediary—“Explicit” Authority in Public Diplomacy Legislation.

One Public Diplomacy authority which might be interpreted to “specifically permit grants to intermediaries” is at Section 801(1) of Smith-Mundt (below). The grantee- intermediary must also be a “nonprofit organization”. Presumably, we could use a procurement contract with a for-profit entity, or we could make a grant to a nonprofit organization to accomplish the same purpose.

22 U.S.C. 1471 (Sec. 801 of the Smith-Mundt Act)

In carrying out the purposes of this chapter, the Secretary is authorized—

(1) In carrying out subchapter II of this chapter [*e.g.*, see below excerpt], ***to make grants*** of money, services, or materials to State and local governmental institutions in the United States, to governmental institutions in other countries, and to individuals and public or private ***nonprofit organizations*** both in the United States and in other countries;

{Excerpt: Subchapter II (Sec. 202) of Smith-Mundt -- 22 U.S.C. 1447.}

The Secretary is authorized to provide for interchanges between the United States and other countries of books and periodicals, including government publications, for the translation of such writings, and for the preparation, distribution, and interchange of other educational materials.

Third Party/Intermediary—“Implicit” Authority in Public Diplomacy Legislation.

Section 212 of USIA’s Authorization Act for FY 1992/1993 (Pub. L. No. 102-138) *both* (i) recognized that third parties/intermediaries were grantees, *and* (ii) established that competition in awarding grants to them was unnecessary.

22 U.S.C. 1475h(b).

The Department of State may award an overseas public diplomacy grant under procedures ***other than competitive procedures*** when—

(3) ***a recipient organization has developed particular expertise in the planning and administration of longstanding exchange programs important to United States foreign policy; ...***

The “Institutional Grant Organizations” are now an integral part of Public Diplomacy activities; for example, 10 FAM 360 (“Briefing Visitors”) provides as follows:

10 FAM 365.2 Reception in Washington, D.C.

Most grantees will be met upon initial arrival in Washington, D.C., by a representative of the Department ***or the Washington International Center, part of Meridian House International, a private, non profit group which assists the Department in meeting visitors***. The visitor will be escorted to his or her hotel or other lodging, and furnished with introductory material and instructions regarding appointments.

ATTACHMENT H

FUNDING ISSUES

Anti-Deficiency Act

A Government official cannot obligate funds in excess of or in advance of an appropriation:

31 U.S.C. Sec. 1341. Limitations on expending and obligating amounts.

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

“Bona Fide Needs Rule”

Without express statutory authority, no agency may obligate an appropriation made for the needs of a limited period of time, usually 1 year, for the needs of prior or subsequent years. This is a paraphrase of what we have termed “*the bona fide needs rule*” which is codified at 31 U.S.C. § 1502(a). This rule applies to all federal government funding activities carried out with appropriated funds, ***regardless of whether the funding mechanism used is a contract, grant, or cooperative agreement.***

Matter of: Small Business Administration Questions about Funding of Small Business Development Centers, B-229873 (Nov. 29, 1988).

31 U.S.C. 1502. Balances available

(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability...

ATTACHMENT I

TERMINATION FOR CONVENIENCE (“T-for-C”)

A procurement contract can be unilaterally T-for-C’d “when it is in the Government’s interest” (*see* FAR 52.249-1) — but, typically, T-for-C is inapplicable to assistance relationships. The reason for the differing treatment of acquisition (procurement contracts) and assistance (grants and cooperative agreements) is as follows:

An example of where assistance procedures should differ from procurement is the power to *terminate for the convenience* of the Federal Government. In procurement, when a situation changes so as to nullify the Government’s need for the product or service, the Government has the option of terminating all or part of the contract before its agreed upon completion and making a reasonable settlement with the contractor. In assistance relationships, the Federal Government’s and the recipient’s interests coincide. Accordingly, a similar option would not seem appropriate without specific restrictions. Although the Government may change its objectives, it would not seem appropriate that it have an unrestricted power to unilaterally terminate what was intended to be a project of mutual interest.

GAO: Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements, GGD-81-88 at 53 (1981).

This “policy” has been implemented in OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (1993):

.61 Termination.

(a) Awards may be terminated in whole or in part only if (1), (2) *or* (3) apply.

(1) By the Federal awarding agency, *if a recipient materially fails to comply* with the terms and conditions of an award.

(2) By the Federal awarding agency *with the consent of the recipient*, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraphs (a)(1) or (2).

ATTACHMENT J

REIMBURSABLE INTERAGENCY TRANSACTIONS

The “Rule” (the Miscellaneous Receipts Statute)

31 U.S.C. 3302. Custodians of money

(b) [A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

Some Exceptions to the Rule

I. The Economy Act (available to all agencies)

31 U.S.C. 1535

(a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—

- (1) amounts are available;
- (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
- (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
- (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

(b) Payment shall be made promptly by check on the written request of the agency or unit filling the order. **Payment may be in advance or on providing the goods or services ordered and shall be for any part of the estimated or actual cost as determined by the agency or unit filling the order.** ... Proper adjustment of amounts paid in advance shall be made as agreed to by the heads of the agencies or units on the basis of the actual cost of goods or services provided.

(c) * * * * *

(d) An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit. **The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation, in—**

- (1) providing goods or services; or
- (2) making an authorized contract with another person to provide the requested goods or services.

31 U.S.C. 1536

(a) An advance payment made on an order under section 1535 of this title is credited to a special working fund that the Secretary of the Treasury considers necessary to be established. **Except as provided in this section, any other payment is credited to the appropriation or fund against which charges were made to fill the order.**

(b) An amount paid under section 1535 of this title may be expended in providing goods or services or for a purpose specified for the appropriation or fund credited. Where goods are provided from stocks on hand, the amount received in payment is credited so as to be available to replace the goods unless—

(1) another law authorizes the amount to be credited to some other appropriation or fund; or

(2) the head of the executive agency filling the order decides that replacement is not necessary, in which case, the amount received is deposited in the Treasury as miscellaneous receipts.

(c) **This section does not affect other laws about working funds.**

II. Revolving Funds

“Under the revolving fund concept, receipts are credited directly to the fund and are available, without further appropriation by Congress (unless the legislation specifies otherwise), for expenditures to carry out the purposes of the fund.”
GAO’s Principles of Federal Appropriations Law at 6-130.

An example is Sec. 13 of the State Department Basic Authorities Act (22 U.S.C. 2684).

Note: This is the authority for *ICASS* (“International Cooperative Administrative Support System”). See 6 FAM 910.

- [The Act] “Established a *working capital fund* for the Department of State for expenses and equipment, necessary for maintenance and operation **in the city of Washington and elsewhere** of (1) central reproduction, editorial, data processing, audiovisual, library and administrative support services; (2) central services for supplies and equipment (including repairs); (3) **such other administrative services** as the Secretary, with the approval of the Office of Management and Budget, determines may be performed more advantageously and more economically as central services; ...”
- “The fund shall be reimbursed, or credited with advance payments, from applicable appropriations and funds of the Department of State, **other Federal agencies**, and other sources authorized by law, for supplies and services at rates which will approximate the expense of operations ...”

ATTACHMENT K

FOREIGN ASSISTANCE ACT 632(a)&(b) INTERAGENCY TRANSACTIONS

The following is the text of Section 632 of the Foreign Assistance Act (“FAA”) of 1961 (P.L. 87-195), *as codified at* 22 U.S.C. 2392:

(a) Allocation and transfer of funds

The President may *allocate or transfer* to any agency of the United States Government any part of any funds available for carrying out the purposes of this chapter, including any advance to the United States Government by any country or international organization for the procurement of commodities, defense articles, military education and training, or services (including defense services). Such funds shall be available for obligation and expenditure *for the purposes for which authorized*, in accordance with authority granted in this chapter *or under authority governing the activities of the agencies of the United States Government to which such funds are allocated or transferred*.

(b) Utilization of services and facilities of other agencies

Any officer of the United States Government carrying out functions under this chapter *may utilize the services* (including defense services) *and facilities of*, or procure commodities, defense articles, or military education and training from, *any agency of the United States Government* as the President shall direct, or with the consent of the head of such agency, and funds allocated pursuant to this subsection to any such agency may be established in separate appropriation accounts on the books of the Treasury.

Distinguishing Characteristics

FAA §632(a) — The authority to “allocate or transfer [funds] to any agency”.

1. A §632(a) transaction (*either* an allocation *or* a transfer) is accomplished by a memorandum of understanding. It is analogous to a *grant*, because the funds provided to the recipient agency not only further the purposes of USAID under the Foreign Assistance Act, but also support a program of the recipient agency.
2. The recipient agency assumes program and financial responsibility and may use USAID’s and/or its own authority in obligating the funds -- *but*, unlike a grant, neither an allocation nor a transfer constitutes an *obligation* of funds by USAID. Instead, the funds are obligated by the recipient agency, in accordance with applicable laws.

3. A §632(a) *transfer* is effected by means of a reapportionment by OMB, which “moves” the funds to the recipient’s appropriation account. Thus, a transfer constitutes a *legal* augmentation of the recipient agency’s appropriation. On the other hand, after a §632(a) *allocation*, the funds remain in USAID’s account.¹

4. Because allocated funds remain in USAID’s account, USAID retains some financial responsibility and, therefore, oversight. The recipient agency provides periodic financial reports to USAID and also reports when funds are obligated.

5. The recipient agency must obligate the §632(a) funds (whether allocated or transferred) within the original period of availability.

FAA §632(b) — The authority to “utilize the services and facilities of any agency”.

1. A §632(b) transaction is similar to an Economy Act interagency agreement (“IAA”) which, in turn, is analogous to a procurement *contract* -- the requesting agency (USAID) acquires, on a reimbursable basis, the services or supplies of the servicing agency.

2. As in the case of an acquisition by contract: (a) The IAA should include a scope of work, budget, and other applicable terms and conditions; (b) The servicing agency reports to USAID as specified in the IAA; (c) USAID monitors both financial and programmatic performance.

3. The IAA budget may include the servicing agency’s costs of performance (*e.g.*, “management and operations” expenses).

4. Execution of the §632(b) IAA constitutes an obligation of the funds by USAID, and the funds will generally remain available without fiscal year limitation, irrespective of when performance by the servicing agency actually occurs.²

¹ “An *allocation* is the amount of obligational authority transferred from one agency, bureau, or account that is set aside in a transfer appropriation account to carry out the purposes of the parent appropriation or fund. ... For example, allocations are made when one or more agencies share the administration of a program for which appropriations are made to only one of the agencies or to the President.” GAO, A Glossary of Terms Used in the Federal Budget Process, 3d ed., at 33 (1981).

A “*transfer* between appropriation/fund accounts [is] a transaction that, pursuant to law withdraws budget authority or balances from one appropriation account for credit to another.” Id. at 79.

² Thus, a §632(b) IAA is quite different than an Economy Act IAA: “One-year appropriations obligated by an Economy Act agreement must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not performed or incurred valid obligations under the agreement.” GAO, Principles of Federal Appropriations Law, 2 ed., at 7-23 (1992).

5. The Department of State Acquisition Regulation (“DOSAR”) at Subpart 617.5 implements the Federal Acquisition Regulation guidance for interagency acquisitions that are accomplished under authority of the Economy Act. Pursuant to DOSAR 617.502-70(b)(iv), interagency acquisitions undertaken pursuant to other statutory authorities (*e.g.*, the Foreign Assistance Act) do not fall within the scope of this subpart. Nevertheless, as a matter of procurement policy and to ensure adequate internal control, certain of the subpart’s procedural provisions have been extended to these other acquisitions by the Procurement Executive (A/OPE). Accordingly, among the provisions that are applicable to a §632(b) IAA are the following:

- 617.502-70(a)(2)(iv) -- An IAA involving a transfer of funds into the Department must be cleared by the budget office of the applicable program office, in consultation with the Bureau of Finance and Management Policy (FMP).
- 617.504-70(a) -- Department deputy assistant secretaries or their equivalents are authorized to execute IAAs. Department contracting officers also are authorized to execute IAAs, provided that the contracting officer has an appropriate warrant.
- 617.504-70(b) -- Department of State Form DS-1921 (*Award/Modification of Interagency Acquisition Agreement*) shall be used for IAAs where the Department is the servicing agency -- *if* the requesting agency does not have a similar form that provides the same information. [USAID has its own form; it should be generally acceptable.]
- 617.504-70(c)(3) -- The Office of the Legal Adviser shall review and clear all IAAs prior to their execution.
- 617.504(d)(4) -- If DOS is the servicing agency and the DOS IAA manager believes that contractor support may be needed to meet its obligations under the IAA, the IAA manager shall consult with the appropriate contracting activity before the IAA is signed. That contracting activity will ensure compliance with the Federal Acquisition Regulation. The IAA manager shall assist in preparing any required documentation.
- 617.504(d)(5) -- A uniform numbering system shall be established to distinguish DOS participation in the process. An “alpha numeric” designator shall be assigned to all Department IAAs. [See the detailed guidance in the DOSAR.]

Common Characteristic — Congressional Notification

Congress must be notified at least 15 days in advance of an obligation under either type of transaction. Since the signing of a §632(a) MOU is not itself the obligation, the notice to Congress may, but need not, be provided at that time by USAID or by the recipient agency. However, inasmuch as the signed §632(b) IAA is itself the obligating document, the notification must be provided 15 days prior to such signing.

ATTACHMENT L

REVENUE-GENERATING ACCOUNTS (a.k.a. “RECYCLING” AUTHORITY)

AUTHORIZATION

22 U.S.C. 1475e (Smith-Mundt Act Sec. 810)

(a) Notwithstanding ... any other law or limitation of authority, fees and receipts described in subsection (b) of this section are authorized to be credited each fiscal year for authorized purposes to the appropriate appropriations of the Department of State to such extent as may be provided in advance in appropriations acts.

(b) The fees and receipts described in this subsection are fees and payments received by or for the use of the Department of State from or in connection with—

- (1) English-teaching and library services,
- (2) educational advising and counseling,
- (3) Exchange Visitor Program Services,
- (4) advertising and business ventures of the Voice of America and the International Broadcasting Bureau,
- (5) cooperating international organizations, and*
- (6) Agency-produced publications,
- (7) an amount not to exceed \$100,000 of the payments from motion picture and television programs produced or conducted by or on behalf of the Agency under the authority of this chapter or the Mutual Education and Cultural Exchange Act of 1961 (22 U.S.C. 2451 *et seq.*).

* So in original. The word “and” probably should appear at end of par. (6).

APPROPRIATION

The current (FY 2000) appropriation act (P.L. 106-113, Title IV, Administration of Foreign Affairs - Diplomatic and Consular Programs) states:

“[I]n addition, as authorized by section 810 of the United States Information and Educational Exchange Act [22 U.S.C. 1475e], not to exceed \$6,000,000, to remain available until expended, may be credited to this appropriation from fees or other payments received from English teaching, library, motion pictures, and publication programs, and from fees from educational advising and counseling, and exchange visitor programs; ...”

ATTACHMENT M

GIFT-RECEIVING STATUTES

22 U.S.C. 2697 (Section 25 of the State Department Basic Authorities Act)

(a) Unconditional and conditional gifts

The Secretary of State may accept on behalf of the United States gifts made unconditionally by will or otherwise for the benefit of the Department of State (including the Foreign Service) or for the carrying out of any of its functions. Conditional gifts may be so accepted at the discretion of the Secretary, and the principal of and income from any such conditional gift shall be held, invested, reinvested, and used in accordance with its conditions, except that no gift shall be accepted which is conditioned upon any expenditure which will not be met by the gift or the income from the gift unless such expenditure has been approved by Act of Congress.

(b) Disposition

Any unconditional gift of money accepted under subsection (a) of this section, the income from any gift property held under subsection (c) or (d) of this section (except income made available for expenditure under subsection (d)(2) of this section), the net proceeds from the liquidation of gift property under subsection (c) or (d) of this section, and the proceeds of insurance on any gift property which are not used for its restoration, shall be deposited in the Treasury of the United States. Such funds are hereby appropriated and shall be held in trust by the Secretary of the Treasury for the benefit of the Department of State (including the Foreign Service). The Secretary of the Treasury may invest and reinvest such funds in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. Such funds and the income from such investments shall be available for expenditure in the operation of the Department of State (including the Foreign Service) and the performance of its functions, subject to the same examination and audit as is provided for appropriations made for the Foreign Service by the Congress, but shall not be expended for representational purposes at United States missions except in accordance with the conditions that apply to appropriated funds.

(c) Evidences of unconditional gift of intangible personal property

The evidences of any unconditional gift of intangible personal property (other than money) accepted under subsection (a) of this section, shall be deposited with the Secretary of the Treasury who may hold or liquidate them, except that they shall be liquidated upon the request of the Secretary of State whenever necessary to meet payments required in the operation of the Department of State (including the Foreign Service) or the performance of its functions.

(d) Use of real property or tangible personal property received unconditionally

(1) The Secretary of State shall hold any real property or any tangible personal property accepted unconditionally pursuant to subsection (a) of this section and shall either use such property for the operation of the Department of State (including the

Foreign Service) and the performance of its functions or lease or hire such property, except that any such property not required for the operation of the Department of State (including the Foreign Service) or the performance of its functions may be liquidated by the Secretary of State whenever in the judgment of the Secretary of State the purposes of the gift will be served thereby. The Secretary of State may insure any property held under this subsection. Except as provided in paragraph (2), the Secretary shall deposit the income from any property held under this subsection with the Secretary of the Treasury as provided in subsection (b) of this section.

(2) The income from any real property or tangible personal property held under this subsection shall be available for expenditure at the discretion of the Secretary of State for the maintenance, preservation, or repair and insurance of such property and any proceeds from insurance may be used to restore the property insured.

(e) *Taxation*

For the purpose of Federal income, estate, and gift taxes, any gift, devise, or bequest accepted under this section shall be deemed to be a gift, devise, or bequest to and for the use of the United States.

(f) *Availability of statutory authorities to Broadcasting Board and Administrator of AID*

The authorities available to the Secretary of State under this section with respect to the Department of State shall be available to the Broadcasting Board of Governors and the Administrator of the Agency for International Development with respect to the Board and the Agency.

22 U.S.C. 1479 (Section 902 of the Smith-Mundt Act)

If any other government shall express the desire to provide funds, property, or services to be used by this Government, in whole or in part, for the expenses of any specific part of the program undertaken pursuant to this chapter, the Secretary is authorized, when he finds it in the public interest, to accept such funds, property, or services. Funds so received may be established as a special deposit account in the Treasury of the United States, to be available for the specified purpose, and to be used for reimbursement of appropriations or direct expenditure, subject to the provisions of this chapter. Any unexpended balance of the special deposit account and other property received under this section and no longer required for the purposes for which provided shall be returned to the government providing the funds or property.

22 U.S.C. 2455 (Section 105(f) of the Fulbright-Hays Act)

(f) Foreign governments, international organizations and *private individuals*, firms, associations, agencies, and other groups *shall be encouraged to participate to the maximum extent feasible* in carrying out this chapter *and to make contributions* of funds, property, *and services* which the President is authorized to accept, to be utilized to carry out the purposes of this chapter. Funds made available for the purposes of this chapter may be used to contribute toward meeting the expenses of activities carried out through normal private channels, by private means, and through foreign governments and international organizations. [The President delegated this authority to the Director of USIA in 1961. See Sec. 5(a)(1) of Executive Order 11034. Effective October 1, 1999, all authorities of the Director, USIA, were transferred to the Secretary of State.]